

*On Short Notice:
An Investigation of Vancouver Island Health Authority's
Process for Closing Cowichan Lodge*



ombudsperson

B.C.'s Independent Voice For Fairness

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On Short Notice : an Investigation of Vancouver Island Health Authority's Process for Closing Cowichan Lodge.

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Introduction



In June 2008 our office received a number of complaints from people in the Cowichan area who were concerned about and directly affected by the announced closure of a long established seniors' residential care facility in their community, Cowichan Lodge. They felt the process being followed by the regional health authority in closing the facility on short notice was unfair and that it was causing unnecessary and undesirable stress for the residents of Cowichan Lodge and their families. This report is the result of our investigation of those complaints.

In addition to this investigation, the complaints we received about the closure of Cowichan Lodge were also a contributing factor in my decision in August 2008 to launch a broader systemic investigation into home and community care services for seniors in British Columbia.

In many places a residential care facility is seen as an important part of the fabric of the community, not unlike a school, a park, a library, a hospital, an arena or a community centre. It is where some of our most frail, vulnerable and deserving citizens live. Often it is where long time community residents who can no longer live safely on their own or with family move to spend their remaining years. They are still living within their own community, but in a different home where they can receive the support their physical frailty or cognitive challenges now require them to have. Frequently, as was the case with Cowichan Lodge, family members and service organizations are actively involved in raising funds and providing additional support to enhance the lives of the seniors living in such a home.

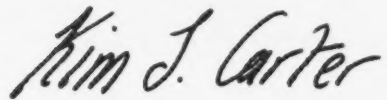
It is therefore not surprising that many people would expect there would be a consideration of the views of residents and family members when a decision is made to close such a facility with less than the required 12 months notice; that there would be an adequate period of time for the seniors affected and their families to adjust to any such decision and make careful and informed choices about where it would be best to move to; and that there would be some flexibility on when that would be.

In fact in 2008 in such a situation there were very few rules about notification of closure and consultation with residents and families that had to be followed. There were, however, some procedural rules that, if observed, could have reduced some of the stress experienced by residents and families. As this investigation shows and as Vancouver Island Health Authority (VIHA) in its response candidly admits it did not follow the correct process in announcing the closure of Cowichan Lodge. VIHA has expressed regret for its actions and has accepted and indicated its commitment to implementing five of the recommendations made in this report to improve that process in the future.

VIHA has indicated there is one recommendation, 3(c), that it cannot accept as it believes it is statutorily bound to refer requests for exemption from the 12-month notice of closure of a residential care facility to VIHA medical health officers. I am satisfied however that there will be consideration of change on that issue at the provincial level as it has been incorporated into our systemic report into home and community care issues, *The Best of Care: Getting it Right for Seniors in British Columbia (Part 2)*.

Introduction

I would like to thank those people who came to us with their concerns and complaints about the process followed in closing Cowichan Lodge. Through their efforts changes have resulted which will assist other seniors and their families in the future.

A handwritten signature in black ink that reads "Kim J. Carter". The script is fluid and cursive, with the first letters of each word being capitalized and prominent.

Kim S. Carter
Ombudsperson
Province of British Columbia

Investigation

Background

Cowichan Lodge, located in the Cowichan Valley, was built and licensed as an intermediate care facility in the early 1980s. Cowichan Lodge was converted to a complex care facility in 2002. In 2008, Cowichan Lodge had 94 beds and was owned and operated by the Vancouver Island Health Authority ("VIHA").

Residential care facilities are not hospitals. Often a residential care facility is a senior's last home in British Columbia. Cowichan Lodge was home to the people who lived there, one resident for eleven years and many residents for at least two years. In June 2008 when VIHA announced the closure of Cowichan Lodge, all 94 beds were occupied, including all 72 permanent complex care beds.

Between June 30, 2008 and August 12, 2008, we received 46 complaints from residents, families and staff of Cowichan Lodge. We provided notice to VIHA of our investigation on July 10, 2008 in writing by letter dated July 25, 2008 and set out the issues we were investigating.

Chronology

In the course of the investigation we received and reviewed extensive information and documentation from VIHA, complainants and other sources. The following are the relevant facts set out in chronological order.

On January 31, 2006, on behalf of VIHA, Partnerships BC issued a request for proposals ("RFP") that sought proposals in eight different local health areas where VIHA had identified a need for additional community services. The RFP sought 160 residential care beds and 50 assisted living units to be built and operated in Cowichan/Duncan by September 2008 at the latest, with a further 20 residential care beds to become available in 2010.

On February 1, 2006, VIHA issued a news release about the RFP including that VIHA sought proposals to build and operate 180 residential care beds and 50 assisted living units in Cowichan/Duncan. The news release reported that in addition to the RFP, VIHA planned, in the health authority generally, to upgrade or replace over 850 complex care beds that were aging and didn't meet modern care needs.

On April 21, 2006, VIHA issued its Five-year Strategic Plan that included information about the number of complex care beds in Cowichan and Lake Cowichan in April 2005 (253), its forecasted need by April 2010 (410) and "planned new capacity" between April 2005 and April 2010 (157 complex care beds plus 100 assisted living beds) in Cowichan and Lake Cowichan.

On June 21, 2006, VIHA signed a project development agreement with the successful proponent of Sunridge Place to provide 160 complex care beds in Cowichan/Duncan. The project development agreement is a standard business practice, setting out negotiated mutual deliverables, including such things as per diem funding and the admission rate of residents. The agreement set out VIHA's per diem funding at opening and required that the operator admit clients in collaboration with VIHA until Sunridge Place was at capacity, no later than 40 days after its opening date.

On July 5, 2006, VIHA publicly released its Health Services Plan for 2005/06 – 2007/08, a plan it had prepared for the Ministry of Health. VIHA planned to increase capacity to meet future demand for residential care and assisted living in a staged fashion with enhancements to existing facilities and completion of several major residential care building projects. The VIHA plan indicated that growth would occur in those communities with the greatest needs.

Investigation

Residents' families told us that in the 18 months prior to the announced closure of Cowichan Lodge (January 2007 to June 2008) VIHA had incurred expenses that reasonably seemed to them to be consistent with its continued operation, including:

- bed to bath lifts at a cost in excess of \$400,000
- installation of a new air conditioning system
- installation of a new call system

In June 2007, VIHA estimated that \$1.32 million would be needed to address the most significant physical deficiencies at Cowichan Lodge. This was for critical building integrity issues but did not include the cost of remediating functional needs within the building.

On August 10, 2007, VIHA's assessment of compliance with multilevel care guidelines for its owned and operated facilities was completed. Cowichan Lodge scored 50 out of 100 in the functional evaluation and had the second lowest score (56 out of 100) in the primary systems condition assessment.

In September 2007, VIHA reported to the Ministry of Health that in fiscal year 2008/09 VIHA planned to convert 19 transitional care beds at Cowichan Lodge to residential care and to close nine temporary funded beds at Cowichan Lodge. In the same report, VIHA stated that Sunridge Place would open and provide 160 residential care beds in 2008/09.

In December 2007, VIHA again reported to the Ministry of Health about planned changes in 2008/09. It reported that on June 30, 2008, nine beds with temporary funding would close at Cowichan Lodge and that Sunridge Place would offer 160 residential care beds on June 30, 2008. VIHA's conversion of 19 transitional care beds at Cowichan Lodge to residential care beds in 2008/09 was again reported but no completion date was provided.

Residents, families and staff told us that Cowichan Lodge had an active auxiliary and that early in 2008 funds were raised for the purchase of a new van for the facility.

On February 21, 2008, the Ministry announced its allocation of funding to VIHA for fiscal year 2008/2009.

An advertisement for employment at Sunridge Place was placed in local papers and set out March 21, 2008 as the deadline to apply for positions. Applications were invited for director of care, director of leisure services, director of food services, office manager, professional practice leader, registered nurses, licensed practical nurses, residential care aides, activity workers, rehab assistant, receptionist, food services workers, cooks, housekeeping, maintenance workers and contract positions including physiotherapist, occupational therapist, social worker, dietician, music therapist and pastoral care.

On April 15, 2008, the Ministry provided further details on funding levels to VIHA.

In April and May 2008, based on these funding levels, VIHA's senior management developed a proposed 2008/2009 operating budget and Service Plan that included a presentation about residential care capacity with planned closure of certain facilities, including Cowichan Lodge. This material was developed for consideration by the VIHA Board at its May meeting.

Another advertisement for employment at Sunridge Place was placed in local papers with June 5, 2008 as the deadline to apply. Applications were invited for direct care positions, support services positions and contract positions for occupational therapist, physiotherapist, music therapist and dietician.

Investigation

A document called “*VIHA – Residential Space Bed Review - April 2008*” was part of the information that VIHA’s executive presented to the VIHA Board on May 28, 2008, which included the proposed closure of Cowichan Lodge. It did not mention the regulatory requirement to provide a year’s notice to the medical health officer of the plan to close Cowichan Lodge or of the requirement to seek an exemption for a closure where less than one year’s notice is proposed.

On May 28, 2008, the VIHA Board considered its 2008/2009 budget and Service Plan, including the presentation about residential care capacity. The decision to close Cowichan Lodge was finalized by the VIHA Board when they approved the 2008/2009 fiscal year’s annual operating budget. Management was directed by the Board at that meeting to make the adjustments necessary to comply with the approved budget.

On June 18, 2008, VIHA management met with union executives to provide them with information about the pending closure of Cowichan Lodge. VIHA believed that the contents of the meeting with union representatives on June 18, 2008 were confidential in accordance with a Settlement Agreement between the provincial government, the Health Employers Association of B.C. and the Facilities Bargaining Association. Pre-notification and confidentiality are both set out in this agreement. While VIHA had planned to and did provide notification on June 20, 2008 to most residents, their families and staff, information about the pending closure became public between June 18 and June 20.

A number of complainants who contacted us had understood that June 18, 2008 was the deadline for job applications to Sunridge Place. Sunridge Place had hired 56 people by June 18, 2008 but had not completed its hiring.

On June 20, 2008, VIHA management met with staff to tell them that Cowichan Lodge would close. Staff were not informed by VIHA that Sunridge Place was still hiring.

On June 20, 2008, the licensed capacity for Cowichan Lodge was 94 beds, including 72 complex care beds, 2 respite beds and 20 transitional care beds. These beds were all occupied at that time.

On June 20, 2008, a local newspaper reported the decision to close Cowichan Lodge.

On June 20, 2008, a letter was posted at Cowichan Lodge, from the manager of Cowichan Lodge to residents and family members, informing people of the decision to close Cowichan Lodge. Copies were available at the reception desk and in the resident units and nursing staff gave copies of the letter to families when they arrived at the facility. The letter was available on site for at least 2 weeks. The letter indicated that a new facility called Sunridge Place was about to open and was “being built to complex care design standards.” The letter said that Cowichan Lodge “does not provide an appropriate care environment for people with complex care needs” and “cannot be renovated to meet complex care design standards.” The letter said that VIHA would start relocating residents in August and anticipated all moves to be finished by mid-September.

The letter was posted at the facility but was not mailed to residents or family members. It did not contain information about a meeting that was scheduled for June 24, 2008 to discuss the closure with families of residents.

Some residents were advised of the decision to close Cowichan Lodge in person. Some family members were contacted by phone through the weekend of June 21 and 22, 2008.

Investigation

The manager of Cowichan Lodge kept a record of the calls made, including which families were reached, where a message was left and where no contact was made. The manager also kept a record of the families that were spoken to in person as they attended the site. According to VIHA, the notes regarding the calls from June 20 – 22, 2008 were discarded after any information that VIHA considered to be significant was incorporated into a summary worksheet dated July 8, 2008.

The summary worksheet dated July 8, 2008 does not include records of phone calls made to families of Cowichan Lodge residents on June 21 and 22, 2008.

Four family members (who were recorded as next of kin in VIHA's records) told us that they were not contacted about the closure prior to the June 24, 2008 meeting.

On Monday, June 23, 2008, VIHA signed a service agreement with the owners of Sunridge Place to provide the services for 160 complex care beds. VIHA and the operator agreed that the facility would maintain a 99% occupancy rate or VIHA could reduce funding.

On June 23, 2008, VIHA's residential services section began working with the unions to develop options for staff (as reported by VIHA in its July 8, 2008 document entitled "*Questions and Answers – the Future of Cowichan Lodge*", distributed at the July 8 meeting for residents' families and posted on VIHA's website).

On June 24, 2008 VIHA's community care licensing office learned of VIHA's residential services' plan to close Cowichan Lodge and requested more information from VIHA's residential services section by e-mail.

On June 24, 2008, the executive director at Sunridge Place wrote to Cowichan Lodge's manager explaining that Sunridge Place was continuing to accept applications in all areas and requesting that this information be communicated to staff. The letter was posted on the staff information board and was shared with staff at staff meetings.

On June 24, 2008, VIHA held a meeting for family members to discuss the closure of Cowichan Lodge and plans for moving residents. At the meeting families were told that Cowichan Lodge was being closed because there were issues with the building and VIHA had safety concerns because of the building's age. Representatives from VIHA were the executive director of continuing care services and the Cowichan Lodge manager of residential care as well as staff from VIHA's communications section who took notes.

The notes from the June 24, 2008 meeting include the following question and answer relating to where residents of Cowichan Lodge could move to in light of its planned closure by mid September 2008.

Question: "Is our preferred choice 100% guaranteed?"

Answer: "Yes, Cowichan Lodge will be given priority to their facility of choice. When we are clear on all the individual preferences."

At the June 24, 2008 meeting, VIHA did not mention the requirement for it to seek an exemption to the 12-month notice requirement in order to close Cowichan Lodge in September 2008.

On June 25, 2008, VIHA's licensing office sent VIHA's residential services section information about the 12-month notice requirement in section 14(1) of the *Adult Care Regulations*. The letter said that an exemption may be requested and that if the exemption was granted that decision could be subject to an appeal to the Community Care and Assisted Living Appeal Board.

Investigation

On June 25, 2008, Sunridge Place opened. Pursuant to its project development agreement with VIHA, signed on June 21, 2006, and the service agreement signed on June 23, 2008, the operator was required to admit residents in collaboration with VIHA and was to be at capacity by August 4, 2008 (40 days after opening).

On June 26, 2008, VIHA's licensing office provided VIHA's residential services section with information on the process to request an exemption by e-mail.

On Friday, June 27, 2008, VIHA's Office of the Chief Medical Health Officer (CMHO) received a letter dated June 20, 2008 from VIHA's Chief Operating Officer (COO) requesting an exemption from the 12-month notice period for closure of Cowichan Lodge to reduce the notice period to three months. VIHA has publicly clarified that the date of June 20, 2008 on the letter was incorrect.

VIHA's COO's letter provided the following explanation for the request for an exemption from the 12-month notice period for the planned closure of Cowichan Lodge:

"...[it] dovetailed with the opening of a new, purpose-built, and licensing-approved site less than 2 kilometres from the current Cowichan Lodge site... An opportunity exists with the opening of Sunridge Place to allow residents and families to remain in their community in a brand new, purpose built site. This opportunity will not be available in 12 months, as this site will be fully occupied by mid-September. The confluence of the opening of the new site and the need for significant repairs at the Cowichan Lodge site requires a waiver of the Adult Care Regulation 12 month period from mid-June to mid-September."

The CMHO conducted an online review of scientific literature on the weekend following receipt of a written exemption request on Friday, June 27, 2008. He also looked at the inspection history of Cowichan Lodge prior to granting the exemption.

On Wednesday, July 2, 2008, before the CMHO had made a decision regarding the COO's request, the Chief Executive Officer (CEO) of VIHA wrote to the CMHO of VIHA with a more detailed request for an exemption from the 12-month notice requirement. The CEO of VIHA requested a notice period of 60 days.

VIHA's CMHO is a provincial order in council appointee and a statutory decision maker with authority under section 16 of the *Community Care and Assisted Living Act* to grant an exemption if satisfied that granting the exemption results in no increased risk to the health and safety of people in care. This statutory duty is an obligation that is imposed by legislation.

In addition to the performance of specific statutory duties the CMHO works collaboratively with managers and health professionals within VIHA to promote health care standards within the community. There is no job description for a CMHO although there is a draft job description for medical health officers from 2004 found in Ministry of Health documentation. The documentation also indicates that a CMHO is responsible to the Provincial Health Officer for the quality of their professional work and is responsible to the CEO or other senior administrative person in a health authority for their program responsibilities. An organizational chart posted on VIHA's website in June 2008 shows a direct reporting relationship from the CMHO to the CEO of VIHA.

Investigation

The CEO's July 2, 2008 request indicated that without an exemption the risk to residents' health and safety would increase exponentially due to problems with staff retention and recruitment at Cowichan Lodge as the closure drew closer. It also indicated that Sunridge Place offered a one time opportunity to relocate residents and stated that a delay in transfer might result in residents being transferred to communities as far away as Port Alberni or Victoria.

The exemption request dated July 2, 2008 included information about a general transition plan to move residents to a new facility. It referred to a literature review, best practice recommendations for relocation and previous experience with relocation to three new facilities. However, the exemption request did not address issues specifically associated with relocating Cowichan Lodge residents in a shorter timeframe due to a reduced notice period.

On that same day, July 2, 2008, VIHA's regional manager of licensing, an employee of VIHA, considered the exemption requests and recommended to the CMHO that the exemption be approved. In the regional manager's opinion there did not appear to be an increased risk to the health and safety of persons in care from reducing the notice period because the persons in care would be moving to a new facility that met or exceeded the requirements of the regulations. The regional manager believed that the argument that staff would leave Cowichan Lodge in search of other employment was reasonable.

Also on July 2, 2008, the day the CEO's more detailed request was sent and received, the CMHO of VIHA granted the exemption requested by the CEO of VIHA, changing the required notice period from one year to 60 days. This decision was made two weeks after VIHA's public announcement that it intended to close Cowichan Lodge and that relocation of residents would be completed by mid September 2008.

In his decision the CMHO stated that he was satisfied that the reduced notice period would not result in an increased risk to the health and safety of residents and met prescribed requirements, but did not set out *how* he had reached these conclusions.

A VIHA auxiliary member contacted family members over the weekend of July 5 and 6, 2008 about an upcoming July 8, 2008 meeting for residents' families.

A poster setting out information about the July 8, 2008 meeting was posted in Cowichan Lodge on July 7, 2008.

On July 8, 2008, VIHA held a second meeting for family members and residents of Cowichan Lodge. The CEO attended the meeting with the COO. VIHA did not keep any minutes, notes or record of that meeting. According to family members who attended the meeting, the reason provided by VIHA for the closure of Cowichan Lodge was that VIHA had committed to fund beds at Sunridge Place and was, therefore, unable to afford the maintenance required at Cowichan Lodge.

A copy of a VIHA document entitled "*Questions and Answers — the Future of Cowichan Lodge*" was distributed at the July 8 meeting and was posted on VIHA's website. It included the following information:

There were 281 beds in the Cowichan/Duncan area and by the end of 2008 there would be 397 beds, 50 of which would be new assisted living units, an increase of 40%.

In June 2007, it was estimated \$1.32 million would be needed to address the most critical physical deficiencies at Cowichan Lodge. This would be just for critical building integrity issues and does not include the cost of remediating functional needs within the building.

Investigation

Since then, about \$600,000 had been spent to address issues impacting patient comfort and safety, including \$510,000 on ventilation upgrades, \$75,000 on kitchen upgrades and \$12,000 on flooring upgrades.

The cost of upgrading Cowichan Lodge to acceptable standards would come in at about the same cost of building a new facility — an estimated \$23 million, and we would still end up with an old building.

Residents will be given priority to relocate to their preferred site.

Options include moving to the new Sunridge Place facility when it opens. Other options include moving to another existing facility in the Cowichan Valley area (e.g. Cairnsmore or Cerwydden), or moving to a location outside Cowichan Valley, if that is their preference.

At the July 8, 2008 meeting VIHA told family members that it had received an exemption to the 12 month notice requirement, permitting it to close Cowichan Lodge in 60 days. VIHA did not inform families of their right to appeal the decision to the Community Care and Assisted Living Appeal Board (CCALAB).

During the period of July 11 to 18, 2008, the Office of the Ombudsperson informed people who contacted our office that the CMHO's exemption decision could be appealed to the CCALAB within 30 days of the decision and that they could request a stay of the decision.

On July 15, 2008, the first complex care resident was moved from Cowichan Lodge to Sunridge Place.

On July 18, 2008, the first appeals were filed with the CCALAB by or on behalf of 24 Cowichan Lodge residents. Appellants requested that the exemption decision be stayed pending the outcome of an appeal on the merits of the CMHO's decision.

On July 21, 2008, the CCALAB provided its written decision and reasons in a separate matter, *Ganton v. Valleyhaven* ("Valleyhaven").¹ Valleyhaven was an appeal of a decision to grant an exemption to the operator of a residential care facility in the Fraser Health Authority. In that case, the CCALAB held, among other things, that the medical health officer failed to consider relevant information in not considering the views of residents and families. While the subject matter differed from the situation at Cowichan Lodge, the decision highlighted the importance of considering the views of residents and families on whether reducing the notice period would result in risk to their health and safety.

On July 25, 2008, a letter was posted at Cowichan Lodge from the CEO of VIHA informing residents and families of the appeals and stay applications.

On July 25, 2008, VIHA posted a fact sheet at Cowichan Lodge titled: "*Cowichan Lodge — Appeal Process*" that stated the CCALAB has no jurisdiction to rule on the closure, only on the decision of the CMHO to reduce the notice requirement. The fact sheet said that VIHA wanted to give Cowichan Lodge residents the "greatest range of choice to meet their individual care needs and preferences" and was holding 70 spaces at Sunridge Place for Cowichan Lodge residents if they chose to locate there, but that VIHA could not hold spaces indefinitely, and that once those spaces were full, residents would be relocated based on the Ministry of Health 'first available bed' policy.

¹ *BG and FS v. Fraser Health Authority and Valleyhaven Guest Home*, 2008 BCCALAB 5.

Investigation

VIHA's July 25, 2008 fact sheet provided no information about how to contact the CCALAB and nor did it mention the timeframe in which an appeal could be filed.

On July 25, 2008 the CCALAB ordered that the exemption granted by VIHA's CMHO be stayed until August 31, 2008 with a view to scheduling an expedited hearing of the appeal during the week of August 25, 2008. The CCALAB concluded that a stay pending appeal would not risk the health and safety of a person in care because of the following:

1. It would not prevent persons in care from transferring voluntarily or prohibit planning for the moves.
2. Cowichan Lodge was compliant with the Act and Regulations.
3. If conditions at Cowichan Lodge threaten the health and safety of residents, the medical health officer (MHO) could take action against the licence.
4. It is the obligation of the licensee to comply with the Act and Regulations including with respect to staffing levels to maintain the required standards of care.
5. The duration of the stay contemplated to accommodate an expedited hearing (in the week of August 25) was short and was within the reduced notice period permitted by the exemption and the self-imposed (by VIHA and Sunridge) window for filling the spaces at Sunridge.

As of August 18, 2008, a total of 41 of the 94 residents had been transferred from Cowichan Lodge to other facilities; 35 complex care residents and six in transitional beds were transferred. The majority, 33 people, transferred to Sunridge Place.

On August 19, 2008, the CEO of VIHA wrote to its CMHO to request the rescission of the exemption. The CEO cited the CCALAB decision in *Valleyhaven* where the CCALAB found that an exemption to certain requirements of the CCALA granted by Fraser Health's MHO was not justified because the Fraser Health Authority's MHO had not considered the views of residents and families before granting an exemption to a regulatory requirement.²

On August 19, 2008 the CMHO of VIHA rescinded the exemption.

On August 20, 2008 VIHA posted a fact sheet entitled "*Cowichan Lodge — Extended Closure Notice*" and announced its extension "for the notice of closure of Cowichan Lodge to August 2009 in order to provide the maximum notice required for the closure of a licensed residential care facility." In this fact sheet, VIHA reported that it would continue to ensure that Cowichan Lodge residents were placed in their first choice facility until the end of September 2008, after which time those remaining residents would "be placed in facilities based on their need and clinical priorities in accordance with the province's First Available Bed policy."

As of August 20, 2008, there were 31 residents remaining in complex care beds at Cowichan Lodge.

On August 20, 2008, the CEO of VIHA and counsel for the CMHO wrote to request that the CCALAB cancel the scheduled appeal hearing and dismiss the appeal because the cancellation of the request for an exemption made the appeal moot. The appellants, residents of Cowichan Lodge and their families, opposed this request as they believed there were outstanding issues to be heard and decided by the CCALAB.

² *BG and FS v. Fraser Health Authority and Valleyhaven Guest Home*, 2008 BCCCALAB 5.

Investigation

The CCALAB issued its decision on August 22, 2008. It stated “the Board is of the view that the Licensee’s surrender to the setting aside of the Exemption in favour of the required 12-month notice period ends the necessity and appropriateness of hearing the merits of the numerous grounds of appeal. It also has the effect of discharging, or making academic, what would otherwise be the appellants’ burden under s. 29(11) of the CCALA to prove that the Exemption was not justified.”³

As of September 19, 2008, 17 of the 94 residents who had been at Cowichan Lodge on June 20, 2008, remained in complex care beds at Cowichan Lodge. In addition, 55 of the 72 complex care residents had been transferred in three months, the majority to Sunridge Place.

On August 21, 2009, the last resident of Cowichan Lodge transferred to Cairnsmore facility in Duncan.

On August 22, 2009, Cowichan Lodge ceased operation as a residential care facility. Fifty of the 72 residents who were in complex care beds at Cowichan Lodge transferred to Sunridge Place.

The total number of displaced Cowichan Lodge staff was 82.

- 46 affected employees were placed by VIHA into positions at the same classification as they held at Cowichan Lodge and 10 employees were transferred to a different classification (promotion, demotion or lateral).
- 53 employees were placed by VIHA into positions in the Duncan and Chemainus area.
- 21 employees retired or resigned with severances.

³ *Twenty-four residents of Cowichan Lodge v. Vancouver Island Health Authority and Cowichan Lodge*, 2008 BCCCALAB 7, at para 8.

Investigation

Issues Investigated

During our investigation the information we considered led us to formulate the administrative fairness issues as follows:

1. Whether VIHA took adequate steps to inform residents and family members of its decision to close Cowichan Lodge and the reasons for it.
2. Whether VIHA acted unfairly in notifying staff of the decision to close Cowichan Lodge five days prior to the opening of Sunridge Place.
3. Whether the processes followed by VIHA in requesting and by VIHA's CMHO in granting an exemption to the regulatory notice requirement were fair and reasonable and in particular:
 - a) Whether VIHA adequately considered the risks to residents' health and safety.
 - b) Whether VIHA acted improperly by informing residents and families that Cowichan Lodge would be closing in less than three months without having requested or received an exemption to the regulatory notice requirement.
 - c) Whether there was a reasonable apprehension of or appearance of bias on the part of the CMHO in granting VIHA's exemption request.
 - d) Whether VIHA acted unfairly by failing to inform concerned residents and families that they could appeal the CMHO's decision to the CCALAB.

Issue #1 — Informing Residents and Family Members

Public authorities regularly make significant decisions that affect services delivered to British Columbians. In 2008, the internal fiscal and operational decision making approach was the standard practice for making decisions about closures of residential care facilities in BC. In such circumstances, public authorities still have to follow administratively fair procedures in dealing with those people who are directly affected by their decisions. These requirements are vitally important when the decision itself will have a significant impact on the lives of individuals and/or will come as a surprise to those affected.

Adhering to the principles of administrative fairness can reduce the adverse effects on those affected and demonstrate the public authority's commitment and desire to be open and transparent. Public authorities must take timely, adequate and appropriate steps to advise the people affected by the decision of the decision. Public authorities also need to be clear in setting out the rationale for the decision; how the decision will affect the individual; whether and how an affected individual can seek review or reconsideration of any part of the decision making process; and what reasonable steps the public authority is prepared to take to minimize any adverse effects of the change on the individual.

Individuals who followed VIHA's publicly available information between 2006 and July 2008 and read VIHA's plans for opening additional residential care beds in the Cowichan/Duncan area would not have reasonably anticipated that closure of Cowichan Lodge was planned for the 2008 timeframe. Between June 2007 and July 2008, VIHA spent about \$600,000 to address issues at Cowichan Lodge that affected residents' comfort and safety, including \$510,000 on ventilation upgrades, \$75,000 on kitchen upgrades and \$12,000 on flooring upgrades.

Investigation

Before June 20, 2008, there was no public discussion of the possibility of closure of Cowichan Lodge. On June 20, 2008, Cowichan Lodge was occupied to its full licensed capacity of 94 beds; it was a well established facility and had active community support.

In these circumstances it was reasonable for residents, family members and staff at Cowichan Lodge to think that there were no imminent plans to close Cowichan Lodge. VIHA should reasonably have concluded that the closure of Cowichan Lodge would surprise those affected and that closure within a two or three month schedule would cause concern and invite questions from residents, families, staff and the community.

By April 2008, the closure of Cowichan Lodge was being considered by VIHA as a real possibility and was being worked on by VIHA staff with an initial proposed closing date of August 1, 2008. As of May 28, 2008, the closure of Cowichan Lodge was a reality with August 1, 2008 identified as the target closure date in the material before the VIHA board when it made its decision. The material submitted by VIHA to its Board made no mention of the requirement of a year's notice to a medical health officer or the need to request an exemption in order to close Cowichan Lodge in a shorter period than a year from the provision of such notice.

The formal decision to close Cowichan Lodge was made by VIHA on May 28, 2008 when the VIHA Board approved its staff recommendation to do so. The decision to close Cowichan Lodge and relocate its residents had a significant and on-going effect on the lives of residents and family members, as well as implications for the wider community.

Nevertheless, it was a full three weeks before the residents, families and staff at Cowichan Lodge were advised of the decision. Given that VIHA wanted to move all residents before mid-September, this delay imposed additional and undesirable time constraints on individual residents and their families who had challenging decisions to make.

The process of advising residents and their families about the decision was neither clear nor consistent. VIHA met with union representatives to provide information about the pending closure of Cowichan Lodge on June 18, 2008. VIHA expected the information would be kept confidential because of the Settlement Agreement between the provincial government, the Health Employers Association of B.C. and the Facilities Bargaining Association. VIHA planned to advise residents and families of the pending closure by a letter made available at Cowichan Lodge on Friday, June 20, 2008. However, information about the pending closure became public between June 18 and June 20, 2008 so that some family members found out about the closure from sources other than VIHA, including the news media.

The June 20, 2008 letter from the Cowichan Lodge manager stated the reason for closure was that Sunridge Place was about to open and Cowichan Lodge "cannot be renovated to meet complex care design standards." It did not mention any meeting on June 24, 2008. Information about the meeting was passed by VIHA staff by phone messages, though not all families were contacted.

At the June 24, 2008 meeting, families were told that Cowichan Lodge was being closed because there were issues with the building and VIHA had safety concerns. No mention was made at that meeting of the need for VIHA to seek an exemption from the 12 month notice requirement in order to meet its desired timetable. Residents and families at the meeting were told by VIHA representatives that they would get priority access to their facility of choice once their individual preferences were indicated.

Investigation

Between Friday, June 27 and Wednesday, July 2, 2008, VIHA representatives sought an exemption to the 12 month notice provision from the CMHO and in support, indicated that an opportunity to transfer to Sunridge Place in Duncan was time limited and that if transfers were not completed by mid-September then Cowichan lodge residents might be transferred as far away as Port Alberni or Victoria.

On July 8, 2008, VIHA held another meeting for residents and family members that representatives of VIHA's senior management attended. No minutes or record of what was said at that meeting was kept by VIHA but a document was distributed by VIHA that stated that residents would be given priority to relocate to their preferred site. The document also stated there would be 347 complex care beds in the Cowichan/Duncan area at the end of 2008 but did not address what had happened to the other 63 beds (for a total of 410 complex care beds) set out in the 2006 planning documents and public announcements.

Conclusion

VIHA did not advise residents and families of its decision in a timely fashion and did not provide a clear, consistent explanation of why the decision was made, how it would affect residents and families, and what steps VIHA would take to mitigate any adverse effects on individual residents.

VIHA consistently failed to inform residents and families of its requirement to request and obtain an exemption for notice of less than 12 months. Not surprisingly perhaps, VIHA also failed to inform people that if the medical health officer reduced the notice period, permitting Cowichan Lodge to close in less than 12 months that residents and families could appeal the decision to the CCALAB.

VIHA provided inconsistent information to people about transferring out of Cowichan Lodge. People were initially told that they would receive priority placement in their facilities of choice. VIHA later began to provide different information, imposing restrictions on when residents' placement decisions had to be made and indicating that a failure to comply might result in residents having to move out of their community or be placed according to the first available and appropriate bed policy. For example, in a fact sheet dated July 25, 2008 VIHA said that once Sunridge Place spaces were full, Cowichan Lodge residents would be relocated based on the Ministry's 'first available bed' policy. This contradicted the information recorded by VIHA at its meeting on June 24, 2008 where families were told that Cowichan Lodge residents would have priority placement in a facility once their preferences were identified.

The policy VIHA referred to as the 'first available bed' policy was in fact not applicable to Cowichan Lodge residents as it applies to those people who are newly eligible for and seeking residential care, not those who require transfer due to planned facility closure. Those reading the fact sheet would be confused about what the policy is for placement of residents when the facility they live in is closing.

Progress

In June 2009, the Ministry issued new provincial guidelines for closure of residential care facilities that applies to all residential care facilities in B.C. The purpose of the guidelines is to ensure that closures comply with a provincial policy and to ensure a consistent approach.

Investigation

The guidelines set out that written notice must be provided by a licensee (which includes a health authority operating a residential care facility) to all affected residents, families and affected staff and that a notification of the closure must also be published in a local paper. This is an improvement over the process followed by VIHA in the closure of Cowichan Lodge, but does not fully address the administrative fairness concerns raised by this situation.

The Ombudsperson finds that

1. VIHA provided inadequate and confusing information to residents and families about the reasons for the closure of Cowichan Lodge and the reasons for the planned schedule to transfer its residents. This contributed to a lack of transparency and an unnecessary and avoidable increase in concern during the closure process.

The Ombudsperson recommends that

1. VIHA develop a publicly available policy that sets out the process it will follow when closing one of its facilities. The policy includes provisions that:
 - VIHA ensure that residents and families affected by a decision to close a facility are informed of the decision at the earliest opportunity.
 - Residents and families are informed by VIHA staff either directly in writing or if more timely notice is required by phone with immediate written follow up.
 - The information provided to all residents and families is consistent and comprehensive; sets out the reason for the decision; explains options available to residents and their families; and includes how to access any avenues of recourse available to residents and families (i.e. Community Care and Assisted Living Appeal Board; Office of the Ombudsperson).
 - VIHA maintain records of who it has contacted, and when and how it has informed residents and families of decisions to close facilities.
 - When VIHA schedules a meeting concerning a decision to close a facility VIHA post an announcement setting out the time, place and purpose of the meeting in a prominent place within the facility and make use of other communication options such as website, email, mail and the media to ensure that information about the meeting is well known to those affected.
 - VIHA keep a record of what its representatives say at any such meeting.
 - A similar publicly available policy be developed by VIHA to cover the process that operators and the health authority are to follow when a non-VIHA operated facility is to be closed.

Investigation

Issue #2 — Notifying Staff of the Decision to Close Cowichan Lodge

On June 21, 2006, VIHA signed a Project Development Agreement with the proponent of Sunridge Place to provide 160 complex care beds in Duncan. In 2007, VIHA was planning for Sunridge Place to open towards the end of June 2008. One of VIHA's requirements was for Sunridge Place to be fully occupied within 40 days of opening. This meant that Sunridge would have to be staffed in the same June/July 2008 timeframe at the latest. Sunridge Place began advertising for and hiring staff in early 2008.

In April and May 2008, VIHA was considering a plan to close Cowichan Lodge and to transfer the majority of its residents to Sunridge Place. VIHA decided to close Cowichan Lodge on May 28, 2008. The original proposed closure date was August 1, 2008 but this changed to the end of September.

Despite being aware that Sunridge Place was actively hiring staff and that the staff of Cowichan Lodge would need to seek other work, VIHA did not inform staff of the decision to close Cowichan Lodge until June 20, 2008, five days before Sunridge Place opened. Although Sunridge Place continued to hire staff after it opened, 56 positions were already filled by June 20, 2008.

Residents, families, and staff expressed concern that VIHA's delay in informing staff of the decision to close Cowichan Lodge failed to recognize the importance of continuity of care and the importance of the established relationships between residents and staff.

When VIHA decided to close Cowichan Lodge, it planned to transfer the majority of residents to Sunridge Place. As a result, it would have been reasonable for VIHA to consider what steps it should reasonably take to enhance staff continuity from Cowichan Lodge to Sunridge Place.

VIHA knew that continuity of care is good for complex care residents and yet there is no indication that VIHA considered the importance of the relationship that may exist between residents and the caregivers they are familiar with when planning to close Cowichan Lodge and transfer its residents to Sunridge Place.

Conclusion

In the circumstances, VIHA should have considered the opening date of Sunridge Place in deciding its timing of information to Cowichan Lodge staff regarding the closure. Given that VIHA was the decision-maker in determining the timetables for both Cowichan Lodge's closure and Sunridge Place's opening, VIHA should have taken steps to ensure that staff from Cowichan Lodge had a reasonable opportunity to apply for positions at Sunridge Place. This is particularly the case given that continuity in care is important for the population group served by Cowichan Lodge and that VIHA planned and did transfer the majority of Cowichan Lodge residents to Sunridge Place.

While there are issues in retaining staff and providing a more seamless process during the transition time prior to closing any facility, it would have been reasonable for VIHA to provide information to staff as well as residents and their families in a timely and transparent manner.

Investigation

The Ombudsperson finds that

2. It was unreasonable for VIHA to delay notifying Cowichan Lodge staff for more than three weeks after the VIHA Board approved the proposed residential care capacity plan that included the decision to close Cowichan Lodge.

The Ombudsperson recommends that

2. When determining a schedule to announce a facility's closure, VIHA should consider all relevant factors, including employment opportunities and recruitment needs at other facilities that residents might transfer to and where staff might wish to apply. VIHA's facility closure process should provide sufficient time to facilitate this.

Issue #3 — The Process Followed by VIHA in Requesting and Granting an Exemption

Considering the Risks to Residents' Health and Safety

The decision to close Cowichan Lodge was made by the VIHA Board on May 28, 2008. The decision was made after considering material presented by VIHA's executive that set out VIHA's global budget management plan, one component of which was the proposed closure of Cowichan Lodge. The materials presented to the Board did not include or refer to any assessment of risk to Cowichan Lodge residents' health and safety as a result of closing the facility and transferring the residents in a short timeframe. The material presented to the Board also did not include any information about the legal requirement to provide a year's notice of the decision to close Cowichan Lodge to the medical health officer (MHO) or the requirement to seek an exemption if the licensee was planning a reduced notice period, as was the case with Cowichan Lodge. While not part of the May 28 presentation, the initial planned closure date was August 1, 2008.

A 12-month regulatory notice requirement of closure of a facility provides time to minimize adverse effects of closure on residents. There is no evidence that VIHA considered the risks to resident health and safety when it initially established the shorter timeframe for the closure of Cowichan Lodge.

Family members who contacted our office expressed concern about the requirement for residents to move in a short timeframe with little advance warning. They said it took some time to decide on the best options in order to minimize the stress on their family members. They said that consistency and routine were very important to many of their family members due to their age and health conditions.

There is also no evidence that at that time VIHA considered its legal requirement to provide one year's notice to the MHO or to seek an exemption from the requirement to establish a shorter timeframe for closing Cowichan Lodge, nor that it considered the possibility that such an exemption might not be granted.

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Relevant information to include in an exemption request

Given that the burden is on VIHA, as the operator, to make the case that a shortened closing time would not result in any increased risk to residents' health and safety, it is important to consider what information VIHA should reasonably have included in its request for an exemption.

A decision to reduce the 12 month regulatory notice requirement of closure of a residential care facility, resulting in a shorter timeframe for planning and moving frail elderly seniors, is a decision that can have serious implications for those residents. These decisions should be based on careful consideration of all the relevant information.

Relevant information in a request for an exemption from the one year notice requirement would include an evaluation of the health and safety of residents, collectively and individually. This would, at a minimum, involve identifying residents who are able to move without any increased risk to their health and safety; residents who are particularly frail and would likely experience an increase in risk to health and safety unless special measures are taken; and residents receiving end-of-life-care, who may not be able to be moved in a shorter time frame even with special measures.

In such circumstances, a request for an exemption would specifically identify the steps that would be taken to mitigate any potential for increased risk to health and safety of individual residents in order to allow them to be moved in a shorter time frame. It would also include information on what flexibility the operator is able to offer to allow individuals to remain in their current placement for an additional period of time.

In order to ensure all relevant information is considered before a conclusion can be drawn that there will be no increased risk to the health and safety of residents due to a shorter time frame for closing a residential care facility some analysis of the health and circumstances of the people who actually will be moved if an exemption is granted needs to be included in the application.

An important part of this process is ensuring that input is sought from the affected residents and family members and considered in the decision making process. It is not sufficient to provide general statements that any increased risk to health and safety of residents will be mitigated after the exemption is granted.

VIHA exemption request

On June 27, 2008, seven days after residents and families were informed of VIHA's decision to close Cowichan Lodge in September 2008, the CMHO of VIHA received a letter from its COO requesting an exemption to reduce the notice period from 12 months to three months. The letter was dated June 20, 2008. VIHA publicly clarified that the date of June 20, 2008 on the letter was incorrect. The letter provided information on Sunridge Place opening, and included the statement that:

"The confluence of the opening of the new site and the need for significant repairs at the Cowichan Lodge site requires a waiver of the Adult Care Regulation 12 month period to a three month period from mid-June to mid-September."

While the letter indicated that under the regulations an exemption can be approved if there is no increased risk to the health and safety of persons in care, there was nothing in the letter to indicate that in making the request, VIHA had considered the risks to residents of Cowichan Lodge associated with a shorter

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timeframe for closure. Rather, VIHA stated that a clinical transition team would support residents through the transition to the new site and “ensure that there is no increased risk to health and safety of the residents at the site.”

Two business days later, on July 2, 2008, the CEO of VIHA wrote to the CMHO of VIHA confirming that VIHA was requesting an exemption to the notice period. The CEO’s seven page request letter includes a significant amount of information on why Cowichan Lodge needs so many repairs. As well, there is a significant amount of information dedicated to explaining the many benefits of Sunridge Place, such as spacious private rooms, private bathrooms, new furnishings, and hallways and common spaces designed to accommodate wheelchairs and other equipment. The request for exemption letter includes the comment that “[t]he pleasurable scent of toast, coffee and tea will waft throughout the dining room from the kitchen/servery located in each dining room.”

The CEO states that “...in order to ensure that residents have access to Sunridge Place, VIHA is seeking this exemption to reduce the notice period ordinarily required under s.14(1) of the *Adult Care Regulation* [to] 60 days.”

The letter goes on to explain that:

...it is VIHA’s position that this exemption request will not result in any increased risk to the health and safety of the persons currently in care at Cowichan Lodge, and in fact, the transfer of these residents to newer facilities such as Sunridge Place will lower the risk to the health and safety of these residents... Should the exemption not be granted, the risks to the health and safety of the residents ... will increase exponentially over the next few months. Specifically the risk is very high that staff will leave the site in search of other employment as the deadline for the closure of the site nears... The ability to transfer residents to new capacity at Sunridge Place will not be available after mid-September 2008. A delay in the transfer process may result in residents being transferred out of their preferred community of Duncan, to facilities across the island in order to close the Cowichan Lodge site at some point in time after the Sunridge site is occupied.

The CEO informed the CMHO that clinical experts would oversee a transition plan with best practices that would apply generally in relocation including listening and responding to concerns, offering tours, pointing out positive aspects of relocation, ensuring care plans were current, and comparing practices at the two facilities to reduce inconsistencies and improve likelihood of client adjustment.

While VIHA did not explain why it felt compelled to submit two exemption requests to the CMHO, it is clear that in VIHA’s first request it did not provide the CMHO of VIHA with any information about what VIHA saw as risks to resident health and safety from a reduced notice period. VIHA’s second request provided its CMHO with VIHA’s analysis in this area. The CEO’s exemption request dated July 2, 2008 requested a revision to the notice period to allow closure within 60 days rather than the three month timeframe included in the first request.

The focus of the submission, however, appears to be not on whether reducing the notice period would result in any increased risk to Cowichan Lodge residents from a move within a shorter timeframe, but rather what extra risks they might face if the CMHO does not grant the exemption application. Perhaps of greatest concern is that some of these additional risks identified are ones within VIHA’s control and which VIHA could take steps to avoid.

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For example, the July 2 letter said that residents would be at risk if staff sought work elsewhere. However, this fails to consider that VIHA as an operator has a legal obligation to recruit staff for the duration of the facility's operation and to provide safe and appropriate care.

While maintaining adequate staffing may be a concern during the period prior to closure that is the case whatever the length of time to closure. This issue has to be addressed through planning. Given that VIHA is both an operator and a funding agency for residential services, it may in fact be better positioned than other operators to continue residential services prior to closure of a facility it operates.

If the possibility of staff leaving because a facility will close is a sufficient reason to approve an exemption, it would become standard practice to routinely request and be granted exemptions for that reason rendering notice requirements and statutory obligations ineffective.

The rationale provided to the CMHO for an exemption to the notice period was not clear. For example, the CEO said that the request for an exemption was made in order to ensure that residents had access to Sunridge Place. However, VIHA could have achieved this by simply presenting Cowichan Lodge residents with the opportunity to move to Sunridge Place. Clearly, an exemption was not required to ensure that residents had access to Sunridge Place.

CMHO Exemption Decision

The CMHO received VIHA's first exemption request concerning Cowichan Lodge closure on June 27, 2008 and conducted a literature review that weekend prior to receiving the next request on July 2, 2008.

Although a scientific literature review occurred the weekend of June 28 and 29, 2008, the majority of material from VIHA was not provided for consideration and analysis until July 2, the day the decision was made. The regional manager of licensing provided a report to the CMHO sometime on July 2. The CMHO also considered the inspection reports for Cowichan Lodge.

The CMHO approved VIHA's exemption request on July 2, 2008, the same day the second, more detailed request was received and about two weeks after VIHA had publicly announced the date it intended to close Cowichan Lodge. In his written decision on July 2 the CMHO noted that he was satisfied that the request for exemption would not result in an increased risk to the health and safety of residents and met prescribed requirements but did not provide reasons as to how he had reached those conclusions.

An important aspect of administrative fairness is that the decision maker consider all relevant information. In considering the potential for increased risk to health and safety and deciding whether to grant the exemption request, the CMHO considered the information put forward by VIHA, conducted a scientific literature review, and researched the inspection history of Cowichan Lodge. However, none of this information related to the effect of a reduced notice period on the specific individuals being transferred.

The CMHO was not provided with the views of residents and their families, care staff, medical staff, the resident/family council, or the active Cowichan Lodge auxiliary. The perspective of residents and families on the implications of granting or not granting the exemption was relevant information that should have been considered by the CMHO.

A CCALAB decision, *Valleyhaven*, provided on July 21, 2008, recognized the importance of considering the perspective of those who would be affected if the exemption were granted.

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On August 19, 2008, the CEO wrote to the CHMO to request a rescission of the exemption decision, citing the CCALAB's decision in *Valleyhaven* in which the Board found that the medical health officer failed to consult with residents and families before granting an exemption.

VIHA's CMHO had only received one other request for an exemption to the requirement to provide 12 months' notice prior to closure of a facility. This occurred in January 2008. The licensee, a private operator, wrote to the CMHO to request an exemption on January 17. The licensing supervisor and regional manager considered the request on January 22 and recommended the exemption be denied. The CMHO wrote to the licensee's representative on January 23 denying the exemption request.

Conclusion

The 12 month notice of closure is a statutory requirement. In support of an exemption application it is important that the applicant provides sufficient information to allow the decision maker to reasonably consider whether there will be any increased risk to the health and safety of the residents in a facility if it is allowed to close in less than 12 months.

In the case of Cowichan Lodge, it is clear that the application for an exemption was not a significant concern for VIHA. It was not raised as an issue with the VIHA Board when its approval for the plan which included closing Cowichan Lodge was proposed and approved in May 2008. The exemption was not sought until after the proposed closure date was announced to union personnel and the first request was dated the same day as VIHA intended to advise families of the closing date.

The first request for an exemption sent from VIHA to its CMHO did not include any information that would allow the decision maker to evaluate whether there would be any increased risk to the health and safety of residents at Cowichan Lodge. The second request for exemption provided information about a general transition plan and referred to a literature review, best practice recommendations for relocation, and VIHA's previous experience with relocation to three new facilities. It also revised the request to allow for a 60 day closure timeframe rather than the previously requested 3 month timeframe. It also did not include information about specific risks to the health and safety of residents of Cowichan Lodge from an early move and how they would be addressed.

Progress

In June 2009, the Ministry established provincial guidelines that set out that an operator must advise families of an application for an exemption to a notice period and must consult with families and provide evidence of the consultation and responses with the exemption request.

A provincial expectation of informing and consulting with those affected is a positive step. However, facility residents and families could reasonably be concerned if their only consultation opportunity is through the facility operator, particularly if they feel there are risks to a reduced timeline for facility closure. Residents and families should be able to provide information to the MHO or other decision maker directly in addition to being consulted by the operator.

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The Ombudsperson finds that

- 3(a). VIHA did not adequately consider the risks to residents' health and safety in requesting an exemption to the 12 month notice for closure and did not submit adequate information to the Chief Medical Health Officer to allow him to consider if there would be an increase to the risk to residents' health and safety if an exemption were granted.

The Ombudsperson recommends that

- 3(a). VIHA develop policy specifying relevant information and criteria that operators (including VIHA) must include for consideration and analysis in any application for an exemption from the 12 month notice of closure under the *Community Care and Assisted Living Act*. This information and these criteria should be designed to assist the decision maker to determine whether there is no increased risk to residents' health and safety if a reduced notice period is approved.

In making decisions on requests for exemptions to the 12 month notice requirements VIHA's CMHO and other decision makers:

1. Consider the views of residents and families who are directly affected by the decision.
2. Ensure there is a mechanism for such views to be submitted directly by residents and families who wish to do so.
3. Set out clearly in their reasons for decision what information they rely upon to conclude there will be no increased risk to the health and safety of persons in care as a result of the shorter timeframe for closure being approved.
4. Include information on any appeal process.

Announcing the Closure Before an Exemption Requested

The decision to close Cowichan Lodge was made at the meeting of VIHA's Board on May 28, 2008. The board approved a "global" budget for the health authority. The supporting material provided to the Board included proposed facility closures and bed reductions. The material proved to the board did not mention the legal requirement to provide a year's notice to the MHO or request an exemption if a closure was to be made more quickly. At that time the planned closure date was August 1, 2008. On June 20, 2008, VIHA posted a letter at Cowichan Lodge informing residents and families that Cowichan Lodge was going to close by mid-September 2008. This gave approximately 12 weeks for all residents to move and be "settled in their new locations."

It was 29 days after the VIHA board's decision and seven days after VIHA's announcements on June 20, 2008, to staff, residents, and families before the office of the CMHO received VIHA's first request for an exemption to the year's notice period on June 27, 2008. This was followed by VIHA's second exemption request dated July 2, 2008.

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In its announcements between June 20 and June 24, 2008 to residents and families, VIHA was selective in the information that it chose to share. VIHA did not advise residents and families that it could not close Cowichan Lodge in the timeframe it envisioned, unless it received an exemption.

VIHA announced a date for closure of Cowichan Lodge to staff, residents and families without first following due process to ensure that the timeline was permitted by law. This announcement could also have been perceived by some people as having the potential to fetter the discretion of the CMHO.

While the regulation is silent on the exact timing of an exemption request, both logic and fairness would suggest that if one has to be made an operator it should ensure that it is submitted prior to informing residents and families of a closure of anything less than a year.

Conclusion

Residents and families were entitled to know VIHA's requirement to seek an exemption, its intention to do so and the reasons for it at the same time that they were told of the plan to close Cowichan Lodge, which should have occurred as soon as possible after the decision was made on May 28, 2008.

The Ombudsperson finds that

- 3(b). VIHA acted improperly by informing residents and families that Cowichan Lodge would close by mid-September 2008 without requesting an exemption and without having made it clear in its closure announcement that a year's notice period was required unless an exemption was granted.

The Ombudsperson recommends that

- 3(b). When planning facility closures, VIHA fulfill its legal obligation to provide one year's notice or seek an exemption to regulatory notice periods. VIHA include in its policies on facility closure the need for regulatory notice requirements to be met and that applications for exemption to reduce a notice period must be made in a timely manner.

When VIHA is planning to close a facility with less than a year's notice it should clearly indicate that any earlier date proposed is conditional on an exemption being granted. As soon as possible VIHA should inform those who will be affected of its intention to seek an exemption and explain how and to whom residents and families can provide their concerns and views on the matter.

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The Role of Chief Medical Health Officer

On June 27, 2008, VIHA's CMHO received a request for an exemption from VIHA's COO and on July 2, 2008, a request from the CEO of VIHA. The CMHO granted VIHA an exemption on July 2, 2008.

The CMHO is a statutory decision maker with authority under section 16 of the *Community Care and Assisted Living Act* to grant an exemption if he is satisfied that granting the exemption would not result in an increased risk to the health and safety of people in care. As such, in law, these decisions can be made by the CMHO.

However, the CMHO is also an integral part of VIHA's infrastructure. This is highlighted by the organizational chart on VIHA's website (as of June 2008 and currently) that shows that the CMHO in VIHA reports directly to the CEO of VIHA and by the CMHO's own correspondence, including the exemption decision for Cowichan Lodge that is written on VIHA's letterhead. Not surprisingly, people who contacted our office raised concerns about the independence of the CMHO in considering and granting VIHA's exemption request.

Analysis

At the time of his appointment in 2002 and in July 2008 when he granted the exemption request, the CMHO was appointed pursuant to the *Health Act*. As such, the CMHO is appointed by order in council on the recommendation of VIHA and is paid by VIHA. VIHA can recommend the CMHO's removal to the Provincial Health Officer who can advise the Lieutenant Governor in Council if he believes the appointment should be rescinded.

As the decision maker considering the exemption application, the CMHO of VIHA was placed in a very difficult position. He reports directly to the CEO of VIHA on some matters and provides advice generally to VIHA, and it was the CEO (as VIHA was the licensee for Cowichan Lodge) who applied for the exemption on July 2, 2008. This relationship resulted in people questioning the independence of the CMHO and having a lack of confidence in the decision making process.

Indeed, even without the egregious circumstances in this situation, there is a question as to whether MHOs and those exercising their statutory delegated decision making powers when integrated into a health authority will be seen as independent and impartial where the applicant for an exemption is their employer, rather than a private operator of a residential care facility. Even with a far more open and transparent process than currently exists, there is an enormous burden to overcome in order to demonstrate that financial and operational considerations play no role in the decision making process.

The timing of these events put the CMHO in an untenable position where any approval of an exemption would be suspect, even if that was the correct decision. VIHA's public announcement that the transfer of Cowichan Lodge residents was to be complete by mid-September 2008 came a week before the CMHO received a first written request for the exemption from VIHA. The fact that VIHA seemed certain of its schedule before having submitted a request added to concerns. It is not surprising that people affected by it felt the process was neither fair nor reasonable.

The CMHO is a statutory decision maker under section 16 of the *CCALA*. Section 16 provides him with authority to exempt an operator from a requirement of the Act or Regulation. Although the operator was the health authority that the CMHO worked within, the CMHO cannot be found to have a reasonable

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apprehension of bias because the *CCALA* expressly states that the decision could be made by the CMHO. As such, his decision to proceed in this manner was lawful. However, the Ombudsperson's mandate is not limited to determining whether decisions are contrary to law but also includes the ability to comment on how legislation is administered. The CMHO could have delegated this decision under the authority of section 33(4) of the *Health Act*. In this situation, that would have been the best approach to ensure the decision would be seen by those affected as separate from VIHA's prior actions even though there would clearly have been a challenge in locating an appropriately qualified person in a timely fashion to do so.

In considering exemption requests submitted by VIHA related to the 12 month notice requirement, the potential for a perceived lack of independence from the applicant could be avoided by having another qualified individual who is not an employee of the health authority or directly affiliated with the health authority consider the request.

Currently, section 70 of the *Public Health Act (PHA)* limits MHOs to exercising their powers and duties only within the geographic area of BC for which they are designated, unless otherwise provided. There are, however, a number of other options that could be considered:

1. Under section 74 of the *PHA*, a MHO may delegate in writing to a person or class of persons his or her authority to grant an exemption under section 16 of the *CCALA*. However, section 74(2) precludes delegation of a power or duty to a MHO who has not been designated to act in the geographic area in which the delegated power or duty is to be exercised or performed. The MHO could however delegate the power or duty under section 16 to a subject matter expert who was not a MHO and who was not directly affiliated with the health authority.
2. Under section 72 of the *PHA*, the Minister of Health may designate a medical practitioner as a temporary MHO to act in one or more geographic areas and designate a person already designated to act in a geographic area that is different from, or in addition to, the geographic area for which the person is already designated. The designation of a temporary MHO can be renewed for up to two terms, each of no more than six months. Requesting that the Minister designate an alternate decision maker for VIHA's own applications for exemption to legal requirements would seem the simplest solution.
3. Another option might involve the Ministry of Health's provincial director of licensing exercising her powers under section 4 of the *CCALA* to consider an application for exemption. While the powers of the director do not specifically authorize her to perform the duty of a MHO, section 4 grants the director several powers including the authority to make other orders that she considers necessary for either the proper operation of a facility or the health and safety of residents.
4. A further longer term option might involve consultation with the Provincial Health Officer (PHO). Currently, section 67 of the *PHA* authorizes the PHO to act as a MHO. However, the PHO can perform a duty of a MHO only if the matter extends beyond the authority of one or more MHOs and coordinated action is needed, or the actions of a MHO have not been adequate or appropriate in the circumstances. These limits would not permit the PHO to consider requests for exemption from a health authority as alternate decision-maker for the MHO unless the PHO made such a decision about the actions of a CMHO or MHO. However, an amendment to the *PHA* to allow the PHO to decide an application from a health authority requesting an exemption to the 12 month requirement could address this issue.

Investigation

Conclusions

The relationship between MHOs and the health authority where they are designated to act can raise perception concerns for the public when the MHO is called upon to make decisions about applications where the applicant is the health authority. Given the legal responsibility of MHOs to make important decisions regarding all licensees, MHOs need to be able to ensure that these decisions are seen to reflect institutional separation from the health authorities they regulate. This will enhance understanding of and confidence in those decisions.

Although the current process is embodied in a statute, it fails to address the realistic and practical concerns that people will have about the fairness of such a process.

The absence of a clear job description for the CMHO also compounds the issues around the accountability of the CMHO in the performance of his responsibilities. In this particular situation the issue was further exacerbated by the timing and nature of VIHA's application for an exemption.

The Ombudsperson finds that

- 3(c). As a statutory decision maker under section 16 of the *Community Care and Assisted Living Act*, the CMHO had the authority to make this decision and therefore by law, was not in a situation where there can be a reasonable apprehension of bias. However, given that the CMHO, in these circumstances, had the ability to delegate the decision to a subject matter expert who was not affiliated directly with VIHA in order to enhance confidence in the independence and impartiality of the decision making process, it would have been better from an administrative fairness perspective to do so.

The Ombudsperson recommends that

- 3(c). VIHA and its CMHO, in consultation with appropriate provincial level authorities, establish a process to ensure an alternate decision maker, not directly affiliated with VIHA, consider VIHA's requests for exemption to the 12 month notice requirement.

Informing Residents and Families about their Right of Appeal

The CMHO granted an exemption on July 2, 2008, to the regulatory notice requirement for the Cowichan Lodge. Decisions of a MHO (which include the CMHO) under section 16 of the *CCALA* can be appealed within 30 days to the CCALAB. Under section 29 of the *CCALA*, an appellant may request that the board stay the decision that is the subject of the appeal, pending a hearing on the merits.

On July 8, 2008, at a meeting with VIHA's CEO and COO, families of Cowichan Lodge residents were informed of the CMHO's approval of an exemption that reduced the notice period. VIHA did not inform families that the CMHO's decision was appealable despite the fact that people were clearly displeased with Cowichan Lodge's early closing date.

Investigation

Fairness requires that individuals be informed of available remedies if they are dissatisfied with a decision that affects them. After the exemption was approved, residents and family members could reasonably expect to have been informed by VIHA that they could appeal the exemption decision to the CCALAB and the 30 day timeframe for doing so.

Between July 11 and 18, 2008, we spoke to the family members who had come to us with concerns about VIHA's decision to close Cowichan Lodge. We informed them that the CMHO's exemption decision could be appealed and explained the process for doing so.

The only information provided to Cowichan Lodge residents and families by VIHA about appealing the CMHO's decision was a letter from the CEO and a fact sheet called "*Cowichan Lodge — Appeal Process*", both posted at Cowichan Lodge on July 25, 2008, more than three weeks after the CMHO approved the exemption and a week after a number of appeals were filed with the CCALAB by residents and family members.

The Ombudsperson finds that

- 3(d). Despite being aware that residents and families were concerned about the decision to reduce the notice period and move residents more quickly from Cowichan Lodge, VIHA failed to inform residents and their families that they could appeal the CMHO's exemption decision to the CCALAB.

The Ombudsperson recommends that

- 3(d). VIHA ensure that requests for and decisions about exemptions are posted properly and prominently at affected facilities along with information about how to appeal the decisions.
- VIHA should promptly inform those who are affected about requests for exemptions and exemption decisions and about the right to appeal an exemption decision.

Findings and Recommendations

Informing Residents and Family Members

- F1.** VIHA provided inadequate and confusing information to residents and families about the reasons for the closure of Cowichan Lodge and the reasons for the planned schedule to transfer its residents. This contributed to a lack of transparency and an unnecessary and avoidable increase in concern during the closure process.
- R1.** VIHA develop a publicly available policy that sets out the process it will follow when closing one of its facilities. The policy includes provisions that:
- VIHA ensure that residents and families affected by a decision to close a facility are informed of the decision at the earliest opportunity
 - Residents and families are informed by VIHA staff either directly in writing or if more timely notice is required by phone with immediate written follow up.
 - The information provided to all residents and families is consistent and comprehensive; sets out the reason for the decision, explains options available to residents and their families; and includes how to access any avenues of recourse available to residents and families (i.e. Community Care and Assisted Living Appeal Board; Office of the Ombudsperson).
 - VIHA maintain records of who it has contacted, and when and how it has informed residents and families of decisions to close facilities.
 - When VIHA schedules a meeting concerning a decision to close a facility VIHA post an announcement setting out the time, place and purpose of the meeting in a prominent place within the facility and make use of other communication options such as website, email, mail and the media to ensure that information about the meeting is well known to those affected.
 - VIHA keep a record of what its representatives say at any such meeting.
 - A similar publicly available policy be developed by VIHA to cover the process that operators and the health authority are to follow when a non-VIHA operated facility is to be closed.

Notifying Staff of the Decision to Close Cowichan Lodge

- F2.** It was unreasonable for VIHA to delay notifying Cowichan Lodge staff for more than three weeks after the VIHA Board approved the proposed residential care capacity plan that included the decision to close Cowichan Lodge.
- R2.** When determining a schedule to announce a facility's closure, VIHA should consider all relevant factors, including employment opportunities and recruitment needs at other facilities that residents might transfer to and where staff might wish to apply. VIHA's facility closure process should provide sufficient time to facilitate this.

Findings and Recommendations

The Process Followed by VIHA in Requesting and Granting an Exemption

- F3(a).** VIHA did not adequately consider the risks to residents' health and safety in requesting an exemption to the 12 month notice for closure and did not submit adequate information to the Chief Medical Health Officer to allow him to consider if there would be an increase to the risk to residents' health and safety if an exemption were granted.
- R3(a).** VIHA develop policy specifying relevant information and criteria that operators (including VIHA) must include for consideration and analysis in any application for an exemption from the 12 month notice of closure under the *Community Care and Assisted Living Act*. This information and these criteria should be designed to assist the decision maker to determine whether there is no increased risk to residents' health and safety if a reduced notice period is approved.

In making decisions on requests for exemptions to the 12 month notice requirements VIHA's CMHO and other decision makers:

1. Consider the views of residents and families who are directly affected by the decision.
2. Ensure there is a mechanism for such views to be submitted directly by residents and families who wish to do so.
3. Set out clearly in their reasons for decision what information they rely upon to conclude there will be no increased risk to the health and safety of persons in care as a result of the shorter timeframe for closure being approved.
4. Include information on any appeal process.

- F3(b).** VIHA acted improperly by informing residents and families that Cowichan Lodge would close by mid-September 2008 without requesting an exemption and without having made it clear in its closure announcement that a year's notice period was required unless an exemption was granted.
- R3(b).** When planning facility closures, VIHA fulfill its legal obligation to provide one year's notice or seek an exemption to regulatory notice periods. VIHA include in its policies on facility closure the need for regulatory notice requirements to be met and that applications for exemption to reduce a notice period must be made in a timely manner.

When VIHA is planning to close a facility with less than a year's notice it should clearly indicate that any earlier date proposed is conditional on an exemption being granted. As soon as possible VIHA should inform those who will be affected of its intention to seek an exemption and explain how and to whom residents and families can provide their concerns and views on the matter.

Findings and Recommendations

- F3(c).** As a statutory decision maker under section 16 of the *Community Care and Assisted Living Act*, the CMHO had the authority to make this decision and therefore by law, was not in a situation where there can be a reasonable apprehension of bias. However, given that the CMHO, in these circumstances, had the ability to delegate the decision to a subject matter expert who was not affiliated directly with VIHA in order to enhance confidence in the independence and impartiality of the decision making process, it would have been better from an administrative fairness perspective to do so.
- R3(c).** VIHA and its CMHO, in consultation with appropriate provincial level authorities, establish a process to ensure an alternate decision maker, not directly affiliated with VIHA, consider VIHA's requests for exemption to the 12 month notice requirement.
- F3(d).** Despite being aware that residents and families were concerned about the decision to reduce the notice period and move residents more quickly from Cowichan Lodge, VIHA failed to inform residents and their families that they could appeal the CMHO's exemption decision to the CCALAB.
- R3(d).** VIHA ensure that requests for and decisions about exemptions are posted properly and prominently at affected facilities along with information about how to appeal the decisions.

VIHA should promptly inform those who are affected about requests for exemptions and exemption decisions and about the right to appeal an exemption decision.

Authority Response



January 27, 2012

Ref # 12913

Ms. Kim Carter
Ombudsperson, Province of British Columbia
956 Fort Street
PO Box 9030 Station Provincial Government
Victoria BC V8W 9A3

Dear Ms. Carter:

Re: Your File 08-86693 Report on Vancouver Island Health Authority Closure of Cowichan Lodge

I am responding to your letter of December 19, 2011 regarding the process for the finalization and public release of the above-referenced report.

I appreciate the opportunity to provide the Vancouver Island Health Authority's (VIHA) final response, which I understand will be appended to your report. VIHA thanks you for your efforts on this file, and shares your view that the implementation of the recommendations contained in the report will result in improved processes for both health care service providers and the seniors we serve.

As previously stated, VIHA acknowledges and sincerely regrets that the processes surrounding the closure of Cowichan Lodge in 2008/09 were not managed in an ideal manner.

Since the closure of Cowichan Lodge was first announced in June 2008, VIHA has made significant changes to our processes, policies and procedures regarding facility closures. These changes have been guided by, and will continue to be directed by, legislative requirements, Ministry of Health processes, VIHA learnings and, of course, the recommendations from your respective reports on Cowichan Lodge and Seniors' Care.

While VIHA does not believe it has the statutory authority to accept recommendation 3(c), we fully accept the remaining five recommendations and affirm our commitment to continued implementation of those recommendations.

Again, thank you to you and your staff for your work on this important file.

Regards,

Howard Waldner
President & Chief Executive Officer

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